Supreme Court, U.S.
FILED

941757 APR 25 1995

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No.

IN THE

Supreme Court of the United States

October Term, 1994

KLEENWELL BIOHAZARD WASTE AND GENERAL ECOLOGY CONSULTANTS, INCORPORATED,

Petitioner,

v.

SHARON L. NELSON, Chairman;
RICHARD D. CASAD, Commissioner;
A. J. PARDINI, Commissioner;
Acting In Their Official Capacity As Members Of The Washington Utilities And Transportation Commission,

Respondents.

On Petition for Writ of Certiorari from the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred by holding that a state may require certificates of convenience and necessity for interstate commerce, which the state may withhold on the grounds that there is no need for the transportation service.

2. Whether the Court of Appeals erred by holding that, in a civil rights action against a state administrative agency, the state agency has the right to bind federal courts to the agency's determination of the facts made prior to the agency's actionable conduct and in an agency-initiated investigation.

TABLE OF CONTENTS

Page

Table of Authorities iv

INTRODUCTION 2

OPINIONS BELOW 2

JURISDICTION 2

RELEVANT CONSTITUTIONAL PROVISIONS AND OTHER STATUTES 3

STATEMENT OF THE CASE 3

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT 6

I. The Court of Appeals erred by holding that a state may require certificates of convenience for interstate commerce, which the state may withhold on the grounds that there is no need for the transportation service 6

A. The decision rejected this Court's long-standing interpretation of the Commerce Clause 6

B. The decision rejected this Court's most recent application of the Commerce Clause to the interstate transportation of waste 13

C. The decision creates a split of authority between recent decisions of Courts of Appeal..... 14

D. The decision below creates a mechanism for the states to ban the interstate transportation of waste..... 15

II. The Court of Appeals erred by holding that, in a civil rights action against a state administrative agency, the state agency has the right to bind federal courts to the agency's determination of the facts made prior to the agency's actionable conduct and in an agency-initiated investigation. 18

A. The decision below misapplied *University of Tennessee v. Elliot*..... 19

B. The facts, even as determined by the Commission, bar the decision below 24

CONCLUSION..... 25

TABLE OF AUTHORITIES

CASES Page

American Trucking Associations, Inc. v. Scheiner
483 U.S. 266, 280 (1987) 11

Baldwin v. G.A.F. Seelig
294 U.S. 511 (1935) 9, 11, 24

Barnett v. New York
232 U.S. 14 (1914) 7

Brown-Forman Distillers Corp. v. New York State Liquor Authority
476 U.S. 573 (1986) 9

Buck v. Kuykendall
267 U.S. 307 (1925) ..... 7, passim

C & A Carbone, Inc. v. Town of Clarkstown
114 S. Ct. 1677 (1994) ..... 5, passim

C. A. Bradley v. Public Utilities Commission of Ohio
289 U.S. 92 (1933) 7

Chemical Waste Management, Inc. v. Alabama
112 S. Ct. 2009 (1992) 13

Dennis v. Higgins
498 U.S. 439 (1991) 8, 17, 22

Edgar v. MITE Corp.
457 U.S. 624 (1982) 9, 14

Fort Gratiot Sanitary Landfill, Inc. v. Michigan
112 S. Ct. 2019, 119 L.Ed. 2d 139 (1992) 13

Fry Roofing Co. v. Wood
344 U.S. 157 (1952) 7

George W. Bush & Sons v. Malloy
267 U.S. 317 (1925) 7

H. P. Hood & Sons v. DuMond
336 U.S. 525 (1949) 11, 12

Healy v. Beer Institute
491 U.S. 324 (1989) 9, 15

Interstate Busses v. Holyoke St. Ry. Co.
273 U.S. 45 (1927) 8

Maine v. Taylor
477 U.S. 131 (1986) 14, 15, 17, 25

McDonald, Somer & Frates v. Yolo County
470 U.S. 340 (1986) 20

Medigen v. Public Service Commission
787 F. Supp. 590 (S.D. W.Va. 1991)
787 F. Supp. 602 (S.D. W.Va. 1992)
affirmed 985 F.2d 164 (4th Cir. 1993) ..11, 14, 15, 21

Natural Gas Company v. Slattery
302 U.S. 300 (1937) 22

Neven Bus Lines v. Public Service Commission
182 A. 80 (Pa. Super. Ct. 1935) 11

Philadelphia v. New Jersey
437 U.S. 617 (1978) 13

Pike v. Bruce Church, Inc.
397 U.S. 137 (1970) 14, 15, 16, 20

Port of Seattle v.
Washington Utilities and Transportation Commission
597 P.2d 383 (Wash. 1979) 10

St. Joseph Stock Yard Co. v. United States
298 U.S. 38 (1936) 23

Sprout v. South Bend
277 U.S. 163 (1928) 8

State v. Atlantic Greyhound Corporation
113 S.E.2d 57 (N.C. 1960) 10

State v. Sinclair Pipeline Co.
304 P.2d 930 (Kan. 1957) 10

Union Interchange, Inc. v. Parker
357 P.2d 339 (Mont. 1960) 10

United States v. Morton Salt Co.
338 U.S. 632 (1950) 20

United States v. Powell
339 U.S. 48 (1964) 20

University of Tennessee v. Elliot
478 U.S. 788 (1986) 18, 19, 20, 21

West Lynn Creamery, Inc. v. Massachusetts
129 L.Ed. 2d 157 (1994) 9, 24

Williamson Regional County Planning Commssion v.
Hamilton Bank
473 U.S. 172 (1985) 20

TABLE OF AUTHORITIES

CASES Page

CONSTITUTION AND FEDERAL STATUTES

United States Constitution, Article I, § 8, Cl. 3.....3, 16
Title 42 United States Code Section 1983 .....5, 8
Title 28 United States Code Section 1254 2
Title 28 United States Code Section 1331 5
Title 28 United States Code Section 1343(3).....5

WASHINGTON STATUTES

RCW 81.04.110.....3, 4
RCW 81.04.510.....3, 4, 20
RCW 81.77.040.....3

PUBLICATIONS

New England Journal of Medicine
April 22, 1991
William A. Rutula, Ph.D, M.P.H.....21

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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Kleenwell Biohazard Waste and General Ecology Consultants, Incorporated ("Kleenwell")[1] petitions for a Writ of Certiorari from the February 9, 1995 opinion of the United States Court of Appeals for the Ninth Circuit. Petitioner submits this statement to demonstrate that the Supreme Court has jurisdiction of the Writ of Certiorari and that it should exercise that jurisdiction to review the decision of the Court of Appeals.

OPINIONS BELOW

The February 9, 1995, opinion of the United States Court of Appeals for the Ninth Circuit is reported in 48 F.3d 391 and is attached as Appendix A. The January 22, 1993, Administrative Order of the Washington Utilities and Transportation Commission is attached as Appendix B.

JURISDICTION

The jurisdiction of this Court to review the February 9, 1995, opinion of the United States Court of Appeals is conferred by Title 28, United States Code, Section 1254.

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[1] Kleenwell has no parent company or non wholly-owned subsidiary. There are no parties to this case who are not listed in the caption.

RELEVANT CONSTITUTIONAL PROVISIONS AND OTHER STATUTES

Kleenwell asserts that the State of Washington violated the Commerce Clause of the United States Constitution, Article I, § 8, Cl. 3:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.

This violation occurred when the state applied its requirement for a certificate of convenience and necessity to interstate carriers. The state certificate requirement is contained in RCW 81.77.040.[2]

The proceeding which the state asserts bars the federal courts from making their own findings of fact was conducted under RCW 81.04.510[3] and RCW 81.04.110.[4]

STATEMENT OF THE CASE

Petitioner Kleenwell is a corporation which, since 1989, had been in the business of transporting medical waste. At the institution of this suit, it had approximately one hundred fifty customers. Kleenwell collected medical waste in the State of Washington, accumulated it at a temporary storage site in Washington, and then transported it to California for disposal by incineration. The accumulation was done solely for Kleenwell's convenience, making it more economical to transport the

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[2] *See*, Appendix C.
[3] *See*, Appendix D.
[4] *See*, Appendix E.

waste to California. The generators of the medical waste had no control over the waste after Kleenwell took possession of it and had no access to it while it was in temporary storage in Washington.

Respondents are the members of the Washington Utilities and Transportation Commission ("Commission"), a state regulatory agency empowered by state statute to supervise and regulate transportation of persons and property for hire by motor vehicle upon or over the public highways of Washington.

On January 3, 1992, the Commission issued a penalty assessment in the amount of $6,000 against Kleenwell for transporting medical waste out of state without a certificate of convenience and necessity from the Commission. Kleenwell responded to the assessment on January 21, 1992 by stating that "the transportation in question is interstate in nature." Kleenwell concluded "[t]he penalty assessment should be stricken." Kleenwell did not request a hearing or any proceeding on the Commission's jurisdiction.

On May 13, 1992, the Commission instituted an investigation *on its own motion*, under RCW 81.04.510 and RCW 81.04.110, to decide whether it had jurisdiction over Kleenwell. A hearing was held at which Kleenwell appeared. While the Commission was making this determination, it made no attempt to halt Kleenwell's business. On January 22, 1993, the Commission decided that Kleenwell was not engaging in interstate commerce and, even if it were, the Commission had a right to require a certificate of convenience and necessity. It ordered Kleenwell to cease and desist its operation. On February 19, 1993, the Commission denied Kleenwell's request to reconsider its decision. Kleenwell then filed this case.

Kleenwell filed the Complaint in this case, under Title 42 United States Code Section 1983, alleging that the Commission's certificate requirement, as it applies to Kleenwell, constituted a violation of the Commerce Clause of the United States Constitution. Jurisdiction was conferred on the District Court by Title 28, United States Code, Sections 1331 and 1343(3). Kleenwell requested a preliminary and permanent injunction, prohibiting the Commission from interfering, through the use of civil action, criminal warrants or otherwise, with Kleenwell's transportation of medical waste from Washington to other states, and attorneys' fees.

On April 23, 1993, Kleenwell presented its Motion for a Preliminary Injunction. On that date, from the bench, the District Court denied said Motion. Kleenwell filed a Motion for Reconsideration and a Motion for an Injunction Pending Appeal. Both Motions were denied on May 24, 1993. Kleenwell then filed its appeal of the District Court's denial of a Preliminary Injunction.

On September 10, 1993, the Commission presented its Motion for Summary Judgment. It based its motion on the argument that its own findings of fact were binding on the District Court and that those findings required that its motion be granted. On that date, from the bench, the District Court granted said motion. Kleenwell appealed the District Court's ruling, which was consolidated with the pending appeal on the denial of a Preliminary Injunction.

On April 6, 1994, the consolidated appeals were argued and submitted. On May 19, 1994, the Court of Appeals ordered the parties to brief the impact of this Court's decision in *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994). Memoranda of Law

were submitted. On February 9, 1995, the Court of Appeals affirmed the decision of the District Court.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

I. The Court of Appeals erred by holding that a state may require certificates of convenience and necessity for interstate commerce, which the state may withhold on the grounds that there is no need for the transportation service.

The Court of Appeals held that the State of Washington may require a certificate of convenience and necessity to transport medical waste in interstate commerce.[5] Under the Washington statutory scheme, a certificate will not be issued if the Washington Utilities and Transportation Commission decides that there is no need for the service.[6] There are a number of important reasons why a writ should be granted to review the decision.

A. *The decision rejected this Court's long-standing interpretation of the Commerce Clause.*

This Court has always held that a state may not require a certificate of convenience and necessity for

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[5] The Commission argued below that Kleenwell was not engaged in interstate commerce, but the Court of Appeals assumed that Kleenwell's operation was interstate commerce for purposes of its opinion. (*See, Appendix A, p. 24, fn. 14.)*

[6] *See,* Appendix C.

interstate commerce, when the certificate is granted only on a showing of need for the service. In *Buck v. Kuykendall*, 267 U.S. 307 (1925), this Court found that the State of Washington's certificate requirement violated the Commerce Clause when it was applied to carriers engaged in interstate commerce. In *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994), this Court quoted the language in *Buck* which explained the objectionable nature of a certificate requirement.

> Writing for the Court, Justice Brandeis said of the law: "Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner." Id., at 315-316.

114 S. Ct. at 1684.

This was not the only instance in which this Court made it clear that these certificate requirements are unconstitutional. *See Barnett v. New York*, 232 U.S. 14 (1914); *George W. Bush & Sons v. Maloy*, 267 U.S. 317 (1925). This Court has allowed a state to grant certificates for interstate commerce only when they are used solely for registration and are granted upon application, *Fry Roofing Co. v. Wood*, 344 U.S. 157 (1952), or when they are used merely to designate specific routes to eliminate traffic congestion and not to prohibit interstate commerce. *C. A. Bradley v. Public Utilities Commission of Ohio*, 289 U.S. 92 (1933). While the decision below interprets *Buck* to narrow its scope, this Court has always understood its holding:

> No license from local authorities or certificate of public convenience and necessity is required in respect of transportation that is exclusively interstate. Cf. *Buck v. Kuykendall*, 267 U.S. 307; *Bush Co. v. Maloy*, 267 U.S. 317.

Interstate Busses v. Holyoke St. Ry. Co., 273 U.S. 45, 51 (1927).

> The privilege of engaging in such [interstate] commerce is one which a State cannot deny. *Buck v. Kuykendall*, 267 U.S. 307; *Bush & Sons Co. v. Maloy*, 267 U.S. 317.

Sprout v. South Bend, 277 U.S. 163, 171 (1928).

Since *Buck*, this Court has only strengthened its holding. In *Dennis v. Higgins*, 498 U.S. at 439 (1991), this Court held violations of the Commerce Clause actionable under Title 42 United States Code Section 1983, basing its decision on the concept that engaging in interstate commerce is a "right," "not a franchise or privilege granted by the State." 498 U.S. at 448 (1991). Until Congress acts to alter or eliminate the right to engage in interstate commerce, the Commerce Clause operates as a "guarantee of freedom for private conduct that the State may not abridge." 498 U.S. at 450 (1991). The decision below finds that there is no such guarantee, that it's up to the states to decide whether interstate commerce can occur.

Even if this Court had never specifically addressed the issue, there still would be no problem understanding the constitutional infirmities of a state's certificate requirement for interstate carriers. This Court strictly

prohibits direct regulation of interstate commerce by the states, regardless of the purpose. *Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982) (plurality opinion); *Healy v. Beer Institute*, 491 U.S. 324, 337 fn. 14 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986). There can be no more direct regulation of interstate commerce than a certificate requirement. When the avowed purpose of the obstruction of interstate commerce is to suppress or mitigate the consequences of competition between the states, the obstruction is direct by the very terms of the hypothesis. *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 522 (1935).

The decision below acknowledges that the purpose of a certificate of convenience and necessity is to protect the revenues of existing businesses.[7] This Court, however, has recognized that "[p]reservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits." *West Lynn Creamery, Inc. v. Massachusetts*, 129 L.Ed. 2d 157, 174 (1994). Moreover, while the Court of Appeals justified accepting the Commission's actions on health and safety grounds, it ignored this Court's finding that the relation between earnings and sanitation is "too remote and indirect to justify obstructions to the normal flow of commerce in its movements between states." *Baldwin v. G.A.F. Seelig*, *supra*, at 524.

> The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class

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[7] *See*, Appendix A, p. 22.

or classes. The end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk, the supply being put in jeopardy when farmers of the state are unable to earn a living income. *Nebbia v. New York, supra.* Price security, we are told, is only a special form of sanitary security; the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division.

Baldwin v. G.A.F. Seelig, supra, at 522-523.

Until this case, every lower federal court that has considered the issue has followed *Buck* and held that a state may never require a certificate to engage in interstate commerce, if, as in this case, issuance must be based on a showing of need. *See, Medigen v. Public Service Commission*, 787 F. Supp. 590 (S.D. W.Va. 1991) (listing eight such cases). State courts have likewise followed *Buck*, recognizing that "[t]he rule that a state cannot exact conditions for permission to do interstate commerce is one so well-known that it does not need citation of authority to support it." *Union Interchange, Inc. v. Parker*, 357 P.2d 339, 344 (Mont. 1960). *See, Port of Seattle v. Washington Utilities & Transportation Commission*, 597 P.2d 383, 390 (Wash. 1979); *State v. Atlantic Greyhound Corporation*, 113 S.E. 2d 57 (N.C. 1960); *Neven Bus Lines v. Public Service Commission*, 182 A. 80, 83 (Pa. Super. Ct. 1935); *State v. Sinclair Pipeline Co.*, 304 P.2d 930 (Kan. 1957).

"[T]he right to engage in interstate commerce is not the gift of a state . . . ." *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 535 (1949). Until the decision below, this was a universally recognized legal principle. The reason why it has become so is that this Court has "steadfastly adhered to the central tenet that the Commerce Clause 'by its own force created an area of trade free from interference by the States.'" *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 280 (1987). It has understood the danger of permitting a state to restrict the free flow of goods.

> Our system fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home

> embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him for exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H. P. Hood, supra, at 539.

Under the statutory schemes of Washington and other states, franchises are granted to intrastate garbage and medical waste haulers. Customers are given little or no choice of service, or of rates. Interstate haulers provide a check on those monopolies. If the states let the intrastate haulers charge exorbitant fees to their customers, an interstate market is created. It becomes less expensive to send the waste to another state for disposal than to pay the rate of the monopoly. The decision below eliminates that check.

Kleenwell's service would have one of two effects. It would force the intrastate carriers to lower their rates, which they could do because they can use a local disposal site. Or, it would put the price gougers out of business. Either way, it would end the exploitation that the Commerce Clause was intended to prevent.

The decision below unsettles the settled. It opens a door to a method for states to interfere with interstate commerce long closed to them. *Buck* stood as a bulwark against state protection of established local interests against competition. The decision below removes it and signals the states that such protective behavior is now permissible.

B. *The decision rejected this Court's most recent application of the Commerce Clause to the interstate transportation of waste.*

This Court has issued a series of decisions on the interstate transportation of waste. *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Chemical Waste Management, Inc. v. Alabama*, 112 S. Ct. 2009 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan*, 112 S. Ct. 2019 (1992). Their overriding theme is that a state does not have the right to restrict the flow of waste into or out of the state. Most recently, in *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994), this Court struck down a flow control ordinance which prevented solid waste from leaving the state. It is a case whose facts mirror those of this case, but whose holding was rejected in the decision below.

Carbone dealt with the government grant of a waste processing franchise, which required all nonrecyclable waste discarded within the Town limits be delivered to the Town's designated transfer station. C & A Carbone was prohibited from taking its nonrecyclable waste out of the state under a law which was "not far different from the state law this Court found invalid in *Buck v. Kuykendall* . . . " 114 S. Ct. at 1684. This Court held that the ordinance violated the Commerce Clause "[b]ecause it attains . . . [its] goal by depriving competitors, including out-of-state firms, of access to a local market . . . ." 114 S. Ct. at 1680. "The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition." 114 S. Ct. at 1681.

The present case involves the very state law that was found invalid in *Buck v. Kuykendall*. It involves the exclusion from a local market of a competitor who is using

an out-of-state disposal facility. It involves the hoarding of local waste, and the demand to get rid of it, for favored operators. All of this activity was objectionable to this Court in *Carbone*. The Court of Appeals, however, refused to follow that holding.

C. *The decision creates a split of authority between recent decisions of Courts of Appeal.*

The Court of Appeals for the Ninth Circuit, in its decision below, held that a state may require a certificate of convenience and necessity for the interstate transportation of medical waste. The Court of Appeals for the Fourth Circuit, in *Medigen v. Public Service Commission*, 787 F. Supp. 590 (S.D. W.Va. 1991), 787 F. Supp. 602 (S.D. W.Va. 1992), *affirmed* 985 F.2d 164 (4th Cir. 1993) held that such a certificate requirement violates the Commerce Clause. The issue in the two cases was identical. The results were the exact opposite.

This Court has established different levels of scrutiny to determine whether a State has overstepped its role in regulating interstate commerce. A state statute which directly regulates interstate commerce is generally struck down without further inquiry. *Edgar, supra*, at 641-642. When a state statute discriminates against interstate commerce on its face, or in practical effect, the State must demonstrate both that the statute serves a legitimate local purpose and that this purpose could not be served as well by available nondiscriminatory means. *Maine v. Taylor*, 477 U.S. 131 (1986). When a state statute indirectly affects interstate commerce and regulates evenhandedly, this Court examines whether the state's interest is legitimate and whether the burden is clearly excessive. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

The Ninth Circuit used the lowest level of scrutiny, the *Pike* test, to determine the validity of the state's certificate requirement. The District Court in *Medigen* used the *Maine v. Taylor* test and the Fourth Circuit refused to decide which test was appropriate since the state could not meet even the *Pike* test. Thus, not only did the Ninth Circuit and the Fourth Circuit disregard this Court's absolute bar to the kind of state regulation at issue in this case, their cases have created an additional layer of confusion on the proper standard of analysis.

The Ninth Circuit has gone so far as to substitute an absolute constitutional prohibition with minimal federal review. This is particularly troubling given this Court's language in *Carbone*. In that case, a bar to interstate commerce was justified as necessary to ensure the safe handling and proper treatment of solid waste, the same excuse that is put forth in the decision below. This Court stated that "these arguments must be rejected absent the clearest showing that the unobstructed flow of interstate commerce itself is unable to solve the local problem." 114 S. Ct. at 1683. This is the *Maine v. Taylor* test. The Ninth Circuit used the *Pike* test instead, seemingly determined to grant the states a free hand to obstruct interstate commerce, regardless of this Court's explicit directions. *See, Healy v. Beer Institute*, 491 U.S. 324, 337, fn. 14 (1989). It is a situation that must be corrected and the absolute bar enunciated in *Buck* re-affirmed.

D. *The decision creates a mechanism for the states to ban the interstate transportation of waste.*

The Court of Appeals' refusal to follow *Buck* and *Carbone* has created a mechanism which states can use to control the flow of waste in or out of a state. A state may

prevent out-of-state waste from entering by merely requiring a certificate for the importing carriage, and then denying the resulting applications for failure to demonstrate need. If a state seeks to hoard its waste, it does what Washington has done in this case: require a certificate to take the waste out, and then deny applications to do it. Should a state desire to require export, it can grant certificates that specifically designate out-of-state disposal sites.

The state where waste originates, the state of its final destination, and any states in-between would be able to require certificates. The interstate transportation of waste could occur only if all of these states found that there was a need for it. Should any one state object, interstate transportation of waste would stop, leaving the courts in the position of attempting to glean the true reason for this decision, of acting as utility commissions to determine whether a carrier is entitled to a certificate. It is not hard to see that the courts will be largely unsuccessful in sorting out the motivations of such certificate cases. The Court of Appeals will have created a method to successfully circumvent this Court's decisions on this subject.

Under Washington's statutory scheme, a certificate is granted only if the Commission feels that there is a need for the service. That is its statutory mandate. This prohibition against services that are not needed means that the Commission will not distinguish between carriers who are injurious to a legitimate state interest and those that are not. Carriers who could meet the requirement of the *Pike* test would still be barred from interstate commerce, if the Commission felt there was no need for the service. Conversely, carriers who can demonstrate need do not have to establish that their business will serve the legitimate state interest. Need is enough. The Commission's certificate requirement, when it is applied to

interstate commerce, just cannot be made compatible with the U.S. Constitution.

This Court has approved blanket prohibitions when there was no other way to protect health and safety. *Maine v. Taylor, supra*. This case, however, does not invoke such a bar. Some carriers will be allowed to transport medical waste. Some will not, even though they would operate in exactly the same manner and move exactly the same kind of material as those who are granted a certificate. The Commission will not restrict the flow of harmful material. It will just be denying some carriers the right to transport it. Under the decision below, engaging in interstate commerce is a privilege granted by the state. There is no "guarantee of freedom for private conduct that the State may not abridge," despite what this Court held in *Dennis v. Higgins, supra*, at 450.

Interstate commerce by its definition involves at least two states. U.S. Constitution, Article I, Section 8, Clause 3. A certificate requirement would permit a state to exert its control over commerce in another jurisdiction. A state could use the requirement to redirect that commerce, or stop it. It could use the requirement to hoard its own assets or protect established business from competition. The requirement could be used to Balkanize commerce, a long-standing fear of this Court.

The decision below, if not reversed, will change the nature of interstate commerce nationwide. States will be able to require certificates for more than just the interstate transportation of waste. They will begin to manipulate their new power over the commerce beyond their borders to stifle its flow for their advantage. Interstate commerce will no longer be based upon free competition, but upon the sufferance of the states. Each state will have a right to

veto interstate commerce if it does not believe that the commerce is needed. *Buck* wisely eliminated this possibility. The decision below has now made it a reality.

II. The Court of Appeals erred by holding that, in a civil rights action against a state administrative agency, the state agency has the right to bind federal courts to the agency's determination of the facts made prior to the agency's actionable conduct and in an agency-initiated investigation.

University of Tennessee v. Elliot, 478 U.S. 788 (1986) involved the claim of an employee that he had been improperly fired by the University due to his race. The employee requested an administrative hearing, to contest his proposed termination, before an independent, impartial judge. When the employee did not agree with the judge's determination, he sought to pursue his § 1983 civil rights claim pending in federal court. This Court held that the state agency's findings of fact were binding on the federal courts, when it was acting in its judicial capacity.

This Court of Appeals has now extended this case to force the victim of a civil rights violation to accept the facts as determined by its violator and to wait while the violator creates favorable conditions before engaging in the violation. The decision below will not only foreclose *de novo* review of a state's attempt to interfere with interstate commerce, it will profoundly affect the ability of federal courts to protect citizens from all kinds of improper state action.

A. *The decision misapplied* University of Tennessee v. Elliot.

The Court of Appeals, in the decision below, has decided that a state administrative agency can prevent a party with a federal constitutional claim against that agency from ever fully presenting that claim in federal court. The agency can achieve this, according to the Court of Appeals, by using a self-initiated investigation that permits the state agency to act as its own judge before it inflicts an injury, and prevents factual development of the claim before any other entity. It is stunning to think of the abuse to which such a holding can be put.

The Commission initially assessed a penalty against Kleenwell for operating its medical waste transportation business without a certificate of convenience and necessity. Kleenwell responded by warning the Commission that it was engaged in interstate commerce and thus exempt from the certificate requirement. Kleenwell did not ask for any determination by the Commission of its jurisdiction. Kleenwell did not request a hearing. Kleenwell did nothing to begin any proceeding.

At this point, the Commission could have sought civil enforcement of its penalty in court. This would have meant, however, that an independent entity would have been presented with Kleenwell's claim that the Commerce Clause bars the Commission's actions. The Commission did not pursue this course. It made no attempt to stop Kleenwell's operation or collect those penalties. Instead, the Commission, on its own motion, initiated an investigation before itself to decide how to handle Kleenwell.[8] While a hearing was held and an initial

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[8] There can be no question that the Commission's

decision entered by an administrative law judge, the Commission had the right to make the final decision and it exercised that right.

On January 22, 1993, the Commission decided that Kleenwell must obtain a certificate of convenience and necessity from it to transport medical waste from Washington to California for disposal. The Commission made nine findings of fact.

After the Commission denied Kleenwell's request to reconsider its decision, Kleenwell filed this suit. The Commission then claimed that the federal courts were bound by the Commission's own January 22, 1993, findings of fact. The Court of Appeals agreed.

The Court of Appeals has permitted Kleenwell, and future civil rights victims, to be trapped between the requirement of a final administrative decision and collateral estoppel. While the investigation was going on, Kleenwell could not file suit. A claim that the application of government regulations violates the Constitution is not ripe until the government has reached a final decision regarding the application of the regulations. *Williamson Regional County Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186 (1985). "The Court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *McDonald, Somer & Frates v. Yolo*

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proceeding should be termed an investigation. It was initiated under a statute which designates it as such. RCW 81.04.510. (*See*, Appendix D.) It involved an administrative agency taking steps to inform itself as to whether there was a violation of the law. This Court has found this kind of proceeding to be an investigation, not an adjudication, as was held in *University of Tennessee v. Elliot, supra. United States v. Morton Salt Co.*, 338 U.S. 632, 641-43 (1950); *United States v. Powell*, 379 U.S. 48, 57 (1964).

County, 477 U.S. 340, 348 (1986). On the other hand, when Kleenwell waited to see how far the Commission would go, it forfeited its right to the protection of the federal courts, according to the decision below.

The Commission, in its January 22, 1993, Order, made the finding that medical waste "poses a risk of serious harm to the health and safety of the general public."[9] Once it is permitted to present its evidence before an impartial tribunal, Kleenwell will be able to prove, like Plaintiffs were able to do in *Medigen v. Public Service Commission*, *supra*, that medical waste poses no danger to the public,[10] and that virtually every other state receives adequate medical waste disposal service without restrictive regulations such as the Commission has imposed. With the claim of health and safety eliminated as an excuse for the certificate requirement, the Commission's actions could not even meet the test in *Pike v. Bruce Church, Inc.*, *supra*.

University of Tennessee v. Elliot, *supra*, involved an adjudication requested by the claimed victim of discrimination. It only makes sense that he was not entitled to more than one factual determination. He chose the forum. In this case, the state began its own investigation, decided on its course of action, and then attempted to block Kleenwell from engaging in interstate

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[9] *See*, Appendix B, p. 64.

[10] In opposing the Commission's Motion for Summary Judgment, Kleenwell presented the District Court with the Affidavit of William A. Rutula, Ph. D, M.P.H., which included his article from the April 22, 1991, *New England Journal of Medicine*. The article explained that "there is no evidence that medical waste has led to disease in the hospital or the community." In fact, "household waste contains an average 100 times more microorganisms with pathogenic potential for humans than medical waste."

commerce. Kleenwell is denied even one impartial hearing. Before acting against Kleenwell, the Commission carefully laid the groundwork for its deprivation of Kleenwell's constitutional right to engage in interstate commerce. The Court of Appeals has now held that such action paid off by blocking Kleenwell from a full and fair determination of the facts.

The implication of the decision below for civil rights litigation is immense. Before a civil rights violation, a state agency which intends to engage in questionable conduct can insulate itself from federal court scrutiny by conducting its own proceeding and making factual findings that make litigation success very difficult for the victim. Potential defendants get to tilt future proceedings in their favor by the clever use of their own authority. The victims cannot pick the forum in which they wish to pursue their claim. Such a result is not called for by *University of Tennessee v. Elliot*, but it certainly will deprive future civil rights plaintiffs of their opportunity for relief.

Specifically in the area of interstate commerce, the decision below will virtually eliminate the suits authorized by *Dennis v. Higgins, supra*. No state needs to act in haste when deciding whether to interfere with a carrier's right to engage in interstate commerce. An investigation can always be held. The carrier cannot refuse to participate because the Commerce Clause grants no immunity from a state's investigation. *Natural Gas Company v. Slattery*, 302 U.S. 300, 307 (1937). Facts will be found and, at the state's leisure, a constitutional right deprived.[11] The state will have little to fear from a federal court which cannot

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[11] The quality of the justice that can be expected is demonstrated by the Commission's own Order which found that Kleenwell was not even engaged in interstate commerce. *See*, Appendix B, p. 38.

alter a single fact determined by the state. It is a grim scenario for the right to engage in interstate commerce, as this case amply proves.

This Court, in *St. Joseph Stock Yard Co. v. United States*, 298 U.S. 38 (1936), explained its concerns with allowing administrative agencies such authority:

> . . . Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded . . . . Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority . . .

298 U.S. at 52.

It is a concern which should still exist and which calls for a reversal of the decision below.

B. *The facts, even as determined by the Commission, bar the decision below.*

Assuming *arguendo* that the Court of Appeals was required to rely upon the Commission's findings of fact, those facts established that the Commission still could not impose its certificate requirement on the interstate transportation of medical waste. In fact, the decision below makes it clear that the regulatory scheme in question should never be acceptable under this Court's decisions.

The Commission made nine findings of fact.[12] Not a single finding should have prevented the application of *Buck v. Kuykendall*, *supra*. Rejection of *Buck*, however, still does not lead to the conclusion that the Commission's certificate requirement is constitutional.

The Court of Appeals recognized "[t]he regulatory scheme attempts to ensure the universal service at reasonable rates by issuing certificates within service territories and by regulating rates to ensure that certified carriers remain financially able to serve all of their customers."[13] Revenue generation is not a local interest that can justify discrimination against interstate commerce, however. *C & A Carbone, Inc. v. Town of Clarkstown*, *supra*, at 1684. "To give entrance to that excuse would be to invite a speedy end of our national solidarity." *Baldwin v. G.A.F. Seelig*, *supra*, at 523. Once the Court of Appeals acknowledged that the certificate requirement is used to ensure the economic security of the existing carriers by protecting them from the rigors of interstate commerce, it should have struck it down. *West Lynn*

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12 *See*, Appendix B, pp. 63-66.
13 *See*, Appendix A, p. 22.

Creamery, Inc. v. Massachusetts, supra. No fact found by the Commission could justify any other action.

The findings of fact would also not have supported the decision below if the Court of Appeals had used the test in *Maine v. Taylor, supra.* There was no finding that the Commission's certificate requirement was the only way to achieve a legitimate local purpose. The Commission would have to present substantially more evidence to justify a certificate requirement under those circumstances. Kleenwell is confident that it is a burden that the Commission could not meet.

CONCLUSION

WHEREFORE, Petitioner hereby respectfully requests that this Court grant the Petition for Writ of Certiorari from the United States Court of Appeals for the Ninth Circuit, for the reasons cited herein above.

Respectfully submitted,

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